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IN THE

Supreme Court of the United States

In the Matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for a Writ of Prohibition.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

The Indiana Transportation Company was originally made one of the defendants in the suit of the original libelant, James F. Bishop, as the administrator of the estate of Earl H. Dawson, deceased, in the District Court for the Northern District of Illinois in admiralty.

The libel was *in personam* to recover on a claim arising under the statutes of Illinois for causing the death of Earl H. Dawson, and the Indiana Transportation Company was duly served with process in that suit, by service upon its agent, who was, at that time, within the State of Illinois.

Almost a year thereafter, viz: on the 24th day of July, 1916, three hundred seventy-three other claims were given leave to be added to the original claim

in the libel of James F. Bishop, administrator of Earl H. Dawson, deceased, and after overruling its exceptions to this the Indiana Transportation Company was ruled to answer these additional claims. Over three hundred of these arose on separate death claims against the Indiana Transportation Company under the Illinois death statute, and the remainder were for personal injuries or the destruction of property, arising out of the same disaster. No new service was ever had on any of these claims, and at the time they were allowed to be joined as co-libelants, the Indiana Transportation Company had no one within the Northern District of Illinois upon whom service could be had and was not doing business there.

The Judge's order would result in compelling the Indiana Transportation Company to defend itself in a court outside of its own domicile, and without any service, against three hundred and seventy-three new claims, aggregating a possible liability of over three millions of dollars.

No attempt has ever been made to issue any process on any of these claims, nor was any process issued, or effort made in any way to get jurisdiction over the Indiana Transportation Company. No property was ever libelled, seized or attached in this suit. The Indiana Transportation Company has no property within the Northern District of Illinois, or anywhere in the State, and is doing no business within the Northern District of Illinois, nor was it doing any at the time the amended libel was filed, and was not, at that time, subject to service within the North-

ern District of Illinois, or at any time subsequent thereto.

The Indiana Transportation Company, therefore, has filed its petition for a writ of prohibition stating that the District Court is without jurisdiction in any of the three hundred seventy-three additional claims filed and joined to the original case of Bishop, administrator of Earl H. Dawson, deceased.

I.

The writ of prohibition should issue whenever a lower court is proceeding without jurisdiction either of the subject matter or of the person.

Sec. 234, Judicial Code.

2nd Inst., 202, Lord Coke.

Quimbo Appo v. *People,* 20 N. Y., 531.

Ex parte Williams, 4 Ark., 537; 38 Am. Decisions, 46.

Works on Courts & Jurisdiction, 64.

Penn. Co. v. *Rodgers,* 52 W. Va., 450.

State of Wash. v. *Superior Court,* 15 Wash., 500.

Stuperich Co. v. *Superior Court,* 55 Pac. Rep., 984.

People v. *Wayne Circuit Court,* 26 Mich., 100.

People v. *Inman,* 74 Hun, 130.

Howard v. *Pierce,* 38 Mo., 296.

State v. *Mitchell,* 2 Bailey, 225.

II.

The District Court of the Northern District of Illinois has no jurisdiction of the 373 claims in the amended libel, because there has been no service on the Indiana Transportation Company, and as all these claims are suits *in personam,* jurisdiction can only be acquired by personal service.

Boswells, Lessis v. *Otis,* 9 How., 336.

Scott v. *McNeal,* 154 U. S., 34.

Old Wayne Life Ass'n v. *McDonough,* 204 U. S., 8.

Hovey v. *Elliott*, 167 U. S., 409.
Galpin v. *Page*, 18 Wallace, 350.
Roller v. *Holly*, 176 U. S., 398.
Hart v. *Sansom*, 110 U. S., 151.
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Brooklyn v. *Insurance Co.*, 99 U. S., 362.
Pana v. *Bowler*, 107 U. S., 529.
Webster v. *Reid*, 52 U. S., 436.
Bischoff v. *Wethered*, 76 U. S., 812.
Hollingsworth v. *Barbour*, 29 U. S. (4 Pet.), 466.
Knowles v. *Gas Light & Coke Co.*, 86 U. S., 58.
Pennoyer v. *Neff*, 95 U. S., 714.
Riverside Mills v. *Menefee*, 237 U. S., 189.
Simon v. *Southern Railway*, 236 U. S., 115.

III.

There is nothing in the procedure in admiralty courts which gives the court jurisdiction of suits *in personam*, where there is no service on the defendant.

The Oregon, 158 U. S., 186.
Steamship Zodiac, 5 Fed. Rep., 220.
Walker v. *Hughes*, 132 Fed. Rep., 885.
The Willamette, 70 Fed., 874.
The Nahor, 9 Fed., 213.

IV.

In admiralty cases arising on the Great Lakes, such as the present case, the defendant is entitled to a jury trial, and the court below was without jurisdiction to deprive it of this right by joining 374 separate suits in one libel.

Sec. 566, Revised Statutes, U. S.
The Nyack, 199 Fed., 383.
The Western States, 159 Fed., 354.

ARGUMENT.

I.

THE WRIT OF PROHIBITION IS THE PROPER REMEDY WHENEVER THE LOWER COURT IS PROCEEDING WITHOUT JURISDICTION.

This petition asks for the issuance of the writ of prohibition under Section 234 of the Judicial Code, which provides:

> "The Supreme Court shall have power to issue writs of prohibition to the District Court when proceeding as courts of admiralty and maritime jurisdiction."

Lord Coke (2 Inst., 202) said:

> "Prohibitions by law are to be granted at any time to restrain a court to intermeddle or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary. And it is the folly of such as will proceed in the ecclesiastical court, for that whereof that court hath not jurisdiction, or in that whereof the King's temporal court should have the jurisdiction, and so themselves (by their extraordinary dealings) are the cause of such extraordinary charges, and not the law; for their proceedings in such cases are *coram non judice*, and the King's courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same as well after judgment and execution as before."

In the case of *Quimbo Appo* v. *The People*, 20 N. Y., 531, the Court of Appeals said:

> "The office of this writ is, to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction. It is an ancient and valuable writ, and one the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers with which, under the Constitution and laws of the State, it has been intrusted.
>
> "But it is said, that when the inferior court or tribunal has jurisdiction of the action, or of the subject matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition.
>
> "It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. Mr. Jacob in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: 'Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy.'"

For a further history of the writ of prohibition, we refer to the case of *Ex parte Williams*, 4 Ark.,

537; 38 Am. Decs., 46. This case was decided in 1842, and the court reviews the history, purpose and scope of the writ of prohibition and cites numerous English cases in which the writ had been issued, and for what purpose it was issued.

Should it be desirable or necessary to look into the early history of this ancient writ, this case will furnish much interesting and valuable information. We deem it unnecessary to quote from the decision.

There is statutory authority for issuing this writ, and therefore it is unnecessary to inquire on that subject. That the writ may issue in cases where the jurisdiction of the court as to the subject matter is the inquiry is practically conceded. In this case it is not a question of the court's jurisdiction of the subject matter, but the question of the courts having no jurisdiction of the petitioner in 373 cases in the amended libel.

Works on Courts and Jurisdiction, page 634:

> "Prohibition will lie to prevent action where the court has not jurisdiction of the person as well as in cases where there is absence of jurisdiction of the subject matter."

Penn Co. v. *Rogers,* 52 W. Va., 450:

In that case the court held that the writ of prohibition should have been issued because the court had no jurisdiction over the parties defendant by proper service of process.

State of Washington v. *Superior Court,* 15 Wash., 500:

In this case the Superior Court ordered the defendant to appear and answer, otherwise to suffer

default and judgment. The court held that the lower court must proceed by the service of process to bring in the defendant, and that a mere order of court was not sufficient without the service of process, and it therefore issued the writ of prohibition.

Stuperich Co. v. *Superior Court,* 55 Pac. Rep., 985:

In this case a receiver was ordered to take possession of certain property, which was in possession of petitioner under claim of title of ownership, the writ of prohibition was issued against the Superior Court because the petitioner, not being a party in the Superior Court, could not be summarily dispossessed of his property without a hearing and a trial by jury.

People v. *Wayne Circuit Court,* 26 Mich., 100:

In this case summons was issued against a non-resident defendant not found in the State. A garnishee summons was then taken out, directed to Monroe County and served there. Notice of proceedings was served by mail on principal defendant, in New York. The Supreme Court of Michigan issued the writ of prohibition because there was improper and not legal service on the defendant.

People v. *Inman,* 74 Hun, 130:

In this case the defendant was in attendance in the County and a party to an action pending in the Superior Court of Montgomery County. While there, a summons from a Justice Court was served upon him. The Supreme Court issued the writ of prohibition against the Justice of the Peace pro-

hibiting him from proceeding against the defendant because of improper service, and this was affirmed.

Howard v. *Pierce,* 38 Mo., 296:

In this case the writ went to the County Court for exceeding its jurisdiction in an ejectment case.

State v. *Mitchell,* 2nd Bailey, 224:

In this case the Ordinary ordered the Sheriff of the County to take certain slaves, the property of a deceased person, into custody. Prohibition against this action was prayed for and granted by the Supreme Court, the court saying:

> "It is not necessary to refer to Magna Charta or our Constitution, for the rule that no one be disseized of his freehold, despoiled of his goods or deprived of his liberty or life without being heard, or otherwise than according to law. It is being a rule of common right and in some shape or other is engrafted upon the constitution of every civilized country."

There is, therefore, no question upon the proposition that the court has under the statute the right to issue the writ of prohibition, and that the writ can go as well in cases where the court sought to be restrained exceeds its jurisdiction over the person, as in cases where the court is without jurisdiction of the subject matter brought to it. The reason for the rule is the same in both cases, namely, viz: to prevent doing that which is invalid, and which therefore should be prevented, saving time and expense to the parties litigant.

II.

THE COURT BELOW IS PROCEEDING WITHOUT JURISDICTION OVER THE DEFENDANT, THE INDIANA TRANSPORTATION COMPANY, BECAUSE THIS IS A SUIT IN PERSONAM AND THERE HAS BEEN NO SERVICE ON THE DEFENDANT AS TO THE 373 NEW CLAIMS WHICH HAVE BEEN ADDED TO THE ORIGINAL LIBEL.

The proceeding in the Northern District of Illinois was purely a proceeding *in personam*. No property was libelled, seized or attached. The original libel was a proceeding *in personam* with personal service. The amended libel represented separate suits by separate claimants and had no connection with the original libel, except that the cause of action arose at the same time. The great majority of them arose from the alleged negligent conduct in causing death for which under the Statute of the State of Illinois there was a right of action. While the court of admiralty could be used as a forum, in which to try these actions, they were, strictly speaking, actions arising under the law of Illinois, growing out of an alleged maritime tort.

The effect of the ruling of Judge Landis, allowing the joining of these claims with that in the libel of Bishop, representing Earl H. Dawson, was to give the Federal Court personal jurisdiction over the Indiana Transportation Company, without service on it in any way, shape, form or manner.

This was beyond the power and jurisdiction of the court to do, and therefore any judgment or decree rendered thereon would be void, under the universal principle that all judgments *in personam* must be based on personal service on the defendant.

That this is the universal principle has been stated many times by this court. It has clearly laid down the difference between actions *in personam* and actions *in rem*, and has always held that all judgments *in personam* must be based on personal service.

One of the earliest cases making this distinction is *Boswell* v. *Otis*, 9 Howard, 336. The court there held the judgment of the State Court void because it was a judgment *in personam*, without personal service. The court said (page 348):

> "When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. *And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem. Boswell* v. *Otis*, 9 Howard, 336."

This general principle has been reiterated again and again by this court as one of the fundamental principles of our jurisprudence, and it has arisen in various forms. In the case of *Galpin* v. *Page* a judgment *in personam* was held void when the personal service was made only on the partner of the defendant. (85 U. S., 350.) The general rule was there strongly set forth by the court, as follows (page 368):

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. *It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered.*"

Most of the cases have arisen in cases of State Court judgments, which were claimed to be without due process of law. This court has always said, that any judgment rendered without jurisdiction, over the defendant, was without due process of law under the Federal Constitution. One of the leading cases is the case of *Pennoyer* v. *Neff*, 95 U. S., 714, which reviews all the prior decisions. The court discussed the fundamental principle of law and quoted from the opinion of Mr. Justice Story in *Picquet* v. *Sawn*, page 724, as follows:

"Where a party is within a territory he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice.*"

And later on (page 733) the court set forth a rule concerning due process of law:

"Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution, that is, by the law of its creation, to

> pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

In the case of *Webster* v. *Reid,* 11 Howard, 459, there was a judgment against a large number of defendants in the State Court of Iowa. The defendants were served through the newspapers, as owners of "half breed" lands. This court held the judgments absolutely void for all purposes, and Justice McLean sets forth the rule in sweeping terms near the close of his opinion:

> "By the act under which the suits were instituted no other designation of the defendants was required than 'Owners of the Half Breed Lands lying in Lee County.' These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit, on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities and did not authorize the execution on which the land was sold."

Another leading case is the case of *Scott* v. *McNeal,* 154 U. S., 34, in which a personal judgment was held void where there was no personal service. The decision is interesting, because on page 46 Mr. Justice Gray, in his opinion, stated that the courts

of admiralty were subject to the ordinary rules of jurisdiction:

> "Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The May,* 9 Cranch., 126, 144; *Hollingshead* v. *Barbour,* 4 Pet., 466, 475; *Pennoyer* v. *Neff,* 95 U. S., 714, 727. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, 'unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.' *Rose* v. *Himely,* 4 Cranch., 241, 269. Upon the same principles a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer taking the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson* v. *Whitman,* 18 Wall., 457."

The court in that case held the judgment without service void on the authority of *Pennoyer* v. *Neff,* cited above.

Two other cases which fully discuss all the authorities are *Goldie* v. *Morning News,* 156 U. S., 518,

and *Cooper* v. *Newell*, 173 U. S., 555. In both these cases there is an elaborate collection and citation of authorities.

In the case of *Leigh* v. *Green*, 193 U. S., 79, this court held a certain proceeding *in rem* good on publication, and in his opinion Justice Day made a distinction between proceedings *in personam* and proceedings *in rem*, as follows (page 91):

> "When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment."

Within the last year this court again laid down this general principle in the case of *Simon* v. *Southern Railway*, 236 U. S., 115, and also in the case of *Riverside Mills* v. *Manifee*, 237 U. S., 189. In the latter case Justice White said (page 193):

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot without a violation of the due process clause extend their authority beyond their jurisdiction so as to condemn the resident of another state, when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer* v. *Neff*, 95 U. S., 714, and has been without deviation upheld by a long line of cases, a few of the leading ones being cited in the margin. And that a corporation no more than an

> individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in *Pennoyer* v. *Neff* is also established by the cases referred to and many others."

The principle herein contended for is, therefore, shown to be one of fundamental justice, and it is unimportant whether a suit be in admiralty or in law. The distinction in admiralty, as well as in law, between a proceeding *in personam* and a proceeding *in rem* is universally recognized. Apparently no Judge has ever before attempted to acquire jurisdiction of a defendant in the method followed in the present case, yet we are not entirely without precedent in this matter in admiralty cases.

III.

THERE IS NOTHING IN ADMIRALTY LAW WHICH CAN GIVE A COURT JURISDICTION IN A CASE OF THIS CHARACTER WITHOUT PERSONAL SERVICE.

It is admitted that it is not unusual to join a number of libelants in admiralty, but that, in no way, obviates the necessity of having the defendant before the court.

The first case on this subject reported in the books is the case of *Am. Ins. Company* v. *Johnson*, Fed. Cas., 303. In that case a libel was filed *in personam* in behalf of ten marine insurance companies against the defendant, Charles Johnson. The libelants were underwriters on a cargo of the Brig Hercules, and suit was brought by them jointly because of the misconduct of Johnson in rendering salvage services to the brig, which resulted in her sale, etc.

The justification for joining the libelants was found in that they were all underwriters on the same cargo, for the same voyage, and they were unable to determine how much each one of the different consignments covered by the different underwriters, had been injured and damaged by the misconduct of the defendant, etc. They were all allowed to join as libelants.

It is to be noted that all the libelants in this case joined in the libel as it was originally filed so that the defendant was before the court for all purposes and the jurisdictional question involved here was not in any way involved.

This case is cited in support of the text in Benedict's Admiralty, Section 309, page 219, which statement is as follows:

> "The party really entitled to the relief should always be made libelant, and all persons whose interests rest upon a cause of action common to all may join in one libel, but among themselves their interests are distinct."

This statement cannot be construed as justifying the present ruling of the court as the author is obviously only speaking of cases where the defendant must be served as to all of the libelants, and is, in no way, discussing the jurisdictional point involved here. In fact, we believe that the present case is one of first impression and the point has never been raised before in any of the cases.

In the above statement in Benedict the author cited the case of *Am. Ins. Co.* v. *Johnson, supra,* also the case of *Jacobson* v. *Dallas,* as authority. In the latter case Judge Ballinger, in the Oregon District,

held that Jacobsen, who sued for the loss of his vessel and other property, and for personal injuries in common with Dresser, as administrator of the estate of Hanson, who lost his life, and Ford, who claimed to have sustained personal injuries, all arising out of the misconduct of the Steamer Sarah Dickson. This is the only case *in personam* in the books that goes to the length of joining separate causes of action *in personam,* and in this case also, all the libelants joined in the original libel so that service on the defendant was had for all the claims and the defendant was before the court as to all the libelants, and, therefore, the jurisdictional point was not in any way involved in that case for it is not considered by the court's opinion.

We next find the case of *The Oregon,* 133 Fed. Rep., 653. This is a case similar to the case of *The Prinz Georg,* and was to recover damages under the Federal statute for failing to supply proper food and quarters to passengers on a voyage from Nome to Seattle. The proceeding was *in rem,* and, therefore, as the *res* was before the court, the court had jurisdiction of it for all purposes and allowed all the passengers to join in the libel.

Benedict proceeds in Section 310 to say that in all salvage cases and for violation of passenger agreements and other cases in which many persons may concur in asking damages for the same general cause, it is the uniform practice for all to enter in the same suit. In support of this the author cited the case of *The Prinz Georg,* 19 Fed., 653, and *Jacobson* v. *Dalles P. & A. N. Co.,* 93 Fed., 976, and also *Sun M. I. Co.* v. *Miss. Valley T. Co.,* 14 Fed., 699.

The case of *The Prinz Georg* a number of passengers joined in a proceeding *in rem* against a passenger steamer to recover statutory penalties provided by the act of Congress for a violation of the act relating to the treatment of passengers on passenger steamers. In that decision the court said:

> "In other suits the ruling might be different, but in a proceeding *in rem* in the admiralty this is not irregular or unauthorized and the exception must be overruled."

This case was affirmed by the Circuit Court in 23 Fed., 906.

As this was a suit *in rem* there can be no question whatever but that the decisions of the courts were correct. The only other case in which suit *in personam* is the case of *Sun M. I. Co.* v. *Miss. V. T. Co.*, 17 Fed., 919, and in this case also, a number of shippers were allowed to join as libelants in an action *in personam* as they all joined in the original libel, and service on the defendant would naturally bring it into court for all libelants and no jurisdictional defect could be urged.

It will be noted that in no one of these cases was the jurisdictional point involved. In every case which was *in personam* all the libelants joined in the original libel so that service on the defendant brought it into court to defend against all the libelants and the court, therefore, had jurisdiction *in personam* on proper service.

There is no pretense in any of these cases that a court of admiralty can get jurisdiction of new cases *in personam* without service, and we have discussed the cases in full because we believe it was upon the

statements contained in Benedict, and the cases there cited, that the District Judge based his rulings in the court below.

In particular we believe he relied on the statements in Benedict's Ad., 221, which reads as follows:

> "Where a libel has been filed, and another party has a claim arising out of the same transaction, the proper practice is for him to present a petition to be made a co-libelant. This has been held in reference to seamen, to salvors, to owners of a cargo damaged, and to insurers who have paid a loss where a libel had been filed by the owner of the vessel or the carrier."

It will be noted that Benedict, in none of his statements, covers the point herein involved, which allows subsequent libelants to join, and requires the defendant to answer without service.

There are, however, a number of cases in admiralty which tend to show the courts of admirality are bound by the ordinary rules of service in order to acquire jurisdiction of the defendant.

In *Walker* v. *Hughes,* 132 Fed., 885, which is an admiralty suit, service was made on the defendant by leaving a copy of a citation with a servant at the defendant's residence, and it was held that in order to give the court jurisdiction there must be personal service, or attachment of defendant's property. The court said, "It would be a dangerous proceeding to allow a judgment *in personam* to be obtained without personal service or attachment."

In the case of *Long Island, etc., Trans. Co.,* 5 Fed., 599, the court held that where an amended libel filed

in a suit had a new cause of action, new service upon the filing of that amended libel should be had.

The most interesting case, however, is the case of *The Oregon,* 158 U. S., 186. That suit was originally a libel under which a vessel was attached. It was a suit *in rem.* The vessel was released on stipulation or bond and afterwards other libelants intervened on other claims and the question was whether the bondsman could be held. The court held, as follows:

> "If a vessel is still in custody when the intervening petition is filed, the vessel cannot be released until the stipulation is given to answer all the libels on file. But, if, after the stipulation is given, and the vessel is discharged from custody, other libels are filed, a new warrant of arrest must be issued and the vessel again taken into custody."

This case is extremely interesting because it shows that courts of admiralty are bound by the same fundamental principles of jurisdiction herein relied on. If this were a suit *in rem* and the vessel were still before the court, intervening petitioners could come in at any time, but if the vessel were released on bond, the sureties were liable on their bond, and they were only liable for the amount in suit then before the court, and, if intervening libelants thereupon came in, new service would have to be had. This is the universal rule in admiralty, and shows clearly that the courts of admiralty follow the fundamental principles of our jurisprudence. In fact, should a court of admiralty attempt to transgress it, it would be contrary to the constitutional requirements of due process of law.

This case has been followed in the case of the *Willamette*, 70 Fed., 874, in which case Judge McKenna set aside a judgment rendered in favor of intervening libelants on personal injury claims. The judgments were not even allowed to stand against the owners or claimants of the vessel.

The injustice of the ruling of the court below is manifest. Suppose the Indiana Transportation Company had defaulted on the claim of Earl H. Dawson, deceased? Can it be seriously contended that the District Judge could have amended the libel and entered a default for four million dollars on the original service for a claim of ten thousand? Yet, if the present ruling is to stand, and the District Court for the Northern District of Illinois has jurisdiction of the defendant, this must be the inevitable result.

It is true that in a number of cases courts of admiralty have allowed the original libel to be amended by allowing intervening petitions to be filed in the case of the original libel, and at times this has been done in suits *in personam* as well as in suits *in rem*, but in no case has the present jurisdictional point arisen. In all the cases there has always been either proper service on the defendants, or else the defendants being within the jurisdiction and subject to service, have waived the requirements of service and acceded to the jurisdiction of the court by going to trial. We do not believe that there is any case of record like the present, where an admiralty court has assumed jurisdiction without process over the objection of the defendant, and allowed new claims to intervene without process when

the defendant could not be reached by process, and there was objection to the jurisdiction of the court.

We submit that there is no doubt that this is clearly without jurisdiction. If jurisdiction can be maintained in this way in admiralty it can be done in a court of common law, and it would follow that if a non-resident defendant has one case pending in a court in which service has been obtained, he can be subjected to the jurisdiction of that court in all subsequent litigation without further service of process. This result is opposed to all fundamental principles of law.

No one will contend that a joinder like this could be made in a common law court. Why should it be permitted in an admiralty court? The constitutional right of due process of law is as much a right in one court as another. It governs in all courts.

IV.

THE COURT BELOW HAD NO JURISDICTION TO JOIN ALL THE LIBELANTS IN ONE SUIT, BECAUSE EACH PARTY HERE IS ENTITLED TO A JURY TRIAL AND THERE MUST, THEREFORE, BE A SEPARATE TRIAL FOR EACH CLAIM AND THE JOINDER OPERATES TO DEPRIVE THE DEFENDANT OF ITS RIGHT TO A JURY TRIAL.

There is no trial by jury in admiralty cases except in cases arising upon the Great Lakes and the waters connecting them. Benedict's Admiralty, Sec. 262, the author says:

> "The District Courts, in the exercise of their admiralty jurisdiction, have the three great classes of functions:
>
> "They are Instance Courts, in which are heard and determined civil suits of a maritime

> character between party and party. As instance and prize courts all cases are heard and determined by the court alone, without the aid of a jury."

This would be true if it were not for a class of cases arising on the Great Lakes. Sec. 566, Rev. Stat. U. S., provides:

> "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. *In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories* upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

This case is clearly within this statute. The Steamer Eastland was of more than twenty tons burden, was enrolled and licensed for the coasting trade and at the time of the disaster was bound on a voyage from Chicago, Illinois, to Michigan City, Indiana, by way of Lake Michigan.

The original statute (February 26, 1845, 5 St. at Large, 726) was passed to confer admiralty jurisdiction in cases of contract and tort arising upon the lakes and navigable waters connecting the lakes. When this act was passed it was thought that there was no admiralty jurisdiction upon the Great Lakes,

due mainly to the fact that there was no tide there. In this act there was inserted the following words:

> "Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits where either party shall require it."

The Act of 1845 was first considered by the Supreme Court in the case of *The Genesee Chief,* 12 How., 443. The court in this case sustained the admiralty jurisdiction in a case of collision which arose upon the Great Lakes, and subsequently in the case of *The Eagle,* 8 Wall., 15.

The court said as to this act:

> "It is an act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same. At the time it was enacted it had the effect expressed and intended, and so continued for some seven years, when the case of *The Genesee Chief* was decided. From that time its effect ceased as an enabling act; and has been no longer regarded as such. It is no longer considered by this court as conferring any jurisdiction in admiralty upon the District Courts over the lakes, or the waters connecting them. That is regarded as having been conferred by the grant of general admiralty jurisdiction by the 9th section of the Act of 1789 to these courts. The original purpose of the act, therefore, has ceased, and is of no effect; and in order to give it any, instead of construing it as extending the jurisdiction in admiralty, it must be construed as limiting it—the very reverse of its object and intent, as expressed on its face."

In revising the statutes in 1878 the statute of 1845 was left out of the revision, but the clause relating to jury trials was left in, so that it is well settled at

this time that either side has a right to a jury trial in a case of this character.

Considerable controversy has arisen in the courts upon the question of whether a jury trial in admiralty under this statute was like a jury trial at common law, or like a trial of an issue out of chancery. The leading case supporting the latter view is *Gillett* v. *Pierce,* Fed. Cas. 5437. It was decided by Judge Longyear at Detroit and Mr. H. B. Brown, the late Justice of this court, was the proctor for the libelant and opposed to the jury trial. The court held that the verdict of a jury under this statute was advisory only, although the question did not properly arise in the case, because it was not a case coming within the statute. This decision has been followed in a number of cases. The question is still open in this court.

Passing over the many decisions in which this question has been considered, and coming directly to the case of *The Nyack,* 199 Fed., 383, decided by the Court of Appeals of the Seventh Circuit, Judge Sanborn writing the opinion. In that case there was a verdict by a jury in an admiralty case under this statute.

The court held that although the Circuit Court of Appeals could try an admiralty appeal on the Great Lakes *de novo,* yet the District Court should grant a jury trial on the request of either side and that the jury trial should be held binding on the Judge of the District Court. On page 389 Judge Sanborn says:

> "Following the settled rule of this circuit, therefore, the questions of fact and law involved

> in an admiralty appeal come to us substantially as they do to the District Judge. He may order a jury trial in cases on the Great Lakes and connecting waters, under the Act of 1845, when either party so requests, provided the vessel be engaged in interstate commerce. Whether the verdict shall be treated by the District Court as advisory only, or as binding, may be doubtful; but, however this may be, it is entirely settled that the Circuit Court of Appeals may review the whole case as if it were originally brought there, except that it will not reverse where the evidence is conflicting as a general rule. From the decisions of the Supreme Court in *The Genesee Chief,* 12 How., 443; 13 L. Ed., 1058, and *The Eagle,* 8 Wall., 15; 19 L. Ed., 365, it would appear that the verdict of a jury is binding on the trial court unless set aside under some rule applying generally to jury trials. This view is taken by the Circuit Court of Appeals of the Second Circuit in *The Western States, supra.* At all events the District Court has power to adopt the verdict as it did by its decree, although it is not binding on appeal, except in the limited sense referred to."

The Western States, 159 Fed., 354:

This was an appeal from the verdict of the jury in an admiralty case which was tried in the District Court for the Western District of New York, the cause of action arising on the Great Lakes. The court reviewed the authorities and notably those relating to whether or not the verdict of a jury in admiralty was advisory, and concludes as follows:

> "We do not discover anything in this case or in two others cited by Judge Brown which justified the conclusion that verdicts rendered under Sec. 566 are advisory only. The two other cases cited were *Lee* v. *Thompson,* 3 Woods,

167; Fed. Cas. No. 8202, in which everything Judge Bradley said about jury trials was with reference to feigned issues for the enlightenment of the court, and *Basey* v. *Gallagher,* 20 Wall., 670; 22 L. Ed., 452, which was an action in equity, for an injunction only, in which Justice Field held that the statute of Montana allowing only one form of civic action, and providing that 'issues of fact shall be tried by jury unless a jury is waived or a reference ordered,' was not intended to abolish the difference between legal and equitable actions. He said:

" 'But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought to be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment, respecting them, and not from the judgment of others.'

"Judge Longyear, in *Gillett* v. *Pierce,* Brown's Admiralty, 553; Fed. Cas. No. 5437, held that Section 566 did not apply at all, because the pleadings did not show that the vessel involved was enrolled or licensed for the coasting trade. In his very interesting discussion of that section he simply suggested that Congress should legislate to make the jury trials advisory only. It is true that Judge Ricks, in *The City of Toledo* (E. C.), 73 Fed., 220, did hold such verdicts advisory only because he thought any other construction would be a curtailment of the power of the admiralty Judge. This does

not seem consistent with the view of the Supreme Court in *The Genesee Chief, supra,* which treats the provision as a mere regulation of practice, and was not necessary to be decided because the learned Judge found the vessel did not fall within the provisions of Section 566."

When the Act of 1845 was passed it was thought that cases arising on the Great Lakes were not within the jurisdiction of the admiralty courts, and were therefore within the jurisdiction of the common law courts only. In granting to the admiralty courts jurisdiction, a provision for a jury trial was added out of fear that if this was not done the parties would not be obtaining their constitutional rights of trial by jury. There was no thought of any other than a jury trial according to the common law, such as is provided in the Constitution. The courts were not conferring equity jurisdiction upon the admiralty courts by the Act of 1845, but admiralty jurisdiction with a right to a common law jury trial. No other kind of a jury trial could have been in contemplation and the Act of February 26, 1875, particularly recognized the right of trial by jury in admiralty cases, in that way re-establishing what had been provided thirty years before in the Act of 1845.

Even though the Act of 1875 may have been repealed by the Court of Appeals, Act of 1891, this does not affect the right of a trial by jury under the Act of 1845, in cases arising on the lakes; nor does it weaken the argument that a full jury trial was provided by the Act of 1845.

This case is clearly within the Act of 1845, and under this the parties are entitled to a jury trial in

each of these cases on all of the issues of liability as well as of damage, and that is another reason why libelant cannot join other libelants with different causes of action, in this case.

It is not optional with the court to give or deny the right of trial by jury, because the act provides that the trial by jury must be granted *when either party requires it.*

The issues to be tried in the original case and the 373 additional claims brought into the case by the amendment are as follows:

First. Have the defendants been guilty of negligence in causing the damages complained of?

Second. If that issue is found against the respondents, what is the amount of the damages sustained?

Either party has a right to require a jury to pass upon these issues—both of them. If so, then there must be 374 jury trials of issues in this case and not one trial on 374 claims.

Whatever decisions may be found, or whatever text-writers may have said, there is no precedent in the books or anywhere for joining separate and distinct causes of action with a pending suit, where a jury trial can be demanded to try "all facts put in issue in such suits," as in this case.

If this issue of fact, viz: the determining of the fault of the Steamer Eastland, or others, were to be decided first in each and all of the cases—and this issue must be determined by the District Judge without a jury, then there might be some reason for combining all of the cases for that purpose, but that is not the case here. Each of these libelants, as well

as each of the respondents, has the right to demand a jury trial of the issues in each separate case, and the court must grant it if requested, which might result in as many trials as there are claims.

A separate trial of the issues on each of the claims would be in effect the same as a trial of a separate suit for each claim.

How can the court grant separate hearings in this case when all of the parties are libelants together in one action or suit against all of the defendants, requiring but one trial? How can a jury try this case unless the evidence in each case be introduced separately so it can fix the liability and find the amount of damages in each case, on each claim, depending, as that case must, upon the peculiar facts and circumstances of that case alone?

As amended, the libelants are all joint libelants, on the one side 374 as one party, and on the other side the defendant as the other party.

It is submitted that the ruling of Judge Landis in allowing 373 claimants to join in the original libel operates to deprive the defendants of their proper right to a jury trial. This is a statutory right granted them by the United States statute and means that they have a right to a jury trial at common law. To have this they must have the right to have a separate jury for each separate cause of action, which necessarily means that these must be tried and kept as distinct rights. As soon as they are lumped in one libel, it means that they must be tried and a judgment must be rendered in one suit, and this cannot be done without destroying the defendant's right to a separate jury trial.

We submit that the order of the District Judge, which combined all these suits, operates to deprive the defendant of his right to a jury trial and that the Judge of the District Court is without jurisdiction to make an order of this character and that a writ of prohibition is a proper remedy to prevent it.

In conclusion, therefore, the defendant's position is:

First. Prohibition is a proper remedy in admiralty cases under the United States Statutes, whenever there is a lack of jurisdiction by the court below, either over the subject matter or the person.

Second. A court is always without jurisdiction when it proceeds in an action *in personam* without service of process and this was done by the court below when it took jurisdiction of 373 new claims by joining them to one original libel, and ordered the defendant to plead without requiring any service.

Third. The fundamental principle of jurisprudence, that there is no jurisdiction without service in suits *in personam,* applies equally in admiralty, in equity and at common law, and in this case the Court of Admiralty is clearly without jurisdiction over the petitioner.

Fourth. Under the United States Statute the defendant is entitled, in this case, to a separate jury trial for each claim, and to order a joinder putting 374 cases in one, operates to deprive the defendant of its right to a jury trial, and the court below was without jurisdiction to enter an order which thus deprived the defendant of its statutory right.

The court exceeded its jurisdiction, as well for denying a jury trial by this joinder as by lack of service of process, as indicated above.

The petitioner here therefore insists upon its constitutional right of service of process upon it before it ought to be compelled to go to trial. For this and the other foregoing reasons the petitioner prays that the writ of prohibition may issue as prayed for in the petition.

Respectfully submitted.

CHARLES E. KREMER,
RUSSELL MOTT,
Proctors.

Chicago, October, 1916.